Supreme Court, U.S.
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No. 95-1842

IN THE

Supreme Court of the United States

October Term, 1995

JOHN M. MERRETT, AND CECILIA A. CLAYTON, as personal representative of the estate of Solomon Clayton, Jr., on their own behalf and on behalf of all others similarly situated,

Petitioners

v.

JAMES T. MOORE, as Commissioner of the Florida Department of Law Enforcement; ROBERT DEMPSEY, individually; FRED O. DICKINSON, as Executive Director of the Florida Department of Highway Safety and Motor Vehicles; ROBERT BUTTERWORTH; and LAWRENCE CROW; JOHN M. ERWIN; and JERALD VAUGHN; CITY OF LAKELAND POLICE DEPARTMENT; CITY OF MAITLAND POLICE DEPARTMENT; and CITY OF LARGO POLICE DEPARTMENT,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENTS LAWRENCE CROW, JOHN M. ERWIN, and JERALD VAUGHN, CITY OF LAKELAND POLICE DEPARTMENT, CITY OF MAITLAND POLICE DEPARTMENT, and CITY OF LARGO POLICE DEPARTMENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

None of the issues presented in this Petition for Writ of Certiorari apply to the Cities or the Chiefs.[1] With a broad brush Petitioners refer in their Argument to all Defendants below as "Respondents," despite the significant difference in the issues pertaining to the various Respondents.

Petitioners gloss over the posture of this case as it relates to the Cities and the Chiefs. Petitioners acknowledged the Chiefs "were not present at, and did not directly participate in, the roadblocks." (Petitioners' Lodging A at 5.) Their claims against the Chiefs and the Cities were based entirely on assertions the Chiefs and their Cities were liable as conspirators with the State Respondents for planning the roadblock and drug interdiction effort. Related to that issue, Petitioners claimed the Chiefs and Cities were liable because the Cities delegated final policymaking authority to their Chiefs.

After discovery, the Cities and the Chiefs filed a motion for summary judgment and Petitioners filed a cross-motion for summary judgment on the Chiefs' and Cities' liability. (Petitioners' Lodging A at 2.)[2]

The District Court granted summary judgment in favor of the Chiefs and the Cities on October 6, 1991, finding the

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1. Respondents Crow, Erwin, and Vaughn will be referred to herein as the "Chiefs." The City of Lakeland Police Department, City of Maitland Police Department, and City of Largo Police Department will be referred to herein as the "Cities." The remaining Respondents, James T. Moore, Robert Dempsey, Fred O. Dickinson, and Robert Butterworth, will be referred to herein as the "State Respondents."

2. At the District Court, Petitioners and all Respondents conceded no factual disputes existed and all issues could be decided by summary judgment. *Merrett v. Moore,* 58 F.3d 1547, 1549 n.1 (11th Cir. 1995).

uncontroverted evidence in this case revealed the roadblock and drug interdiction effort was "planned, coordinated, and supervised not by the Chiefs but by the FDLE in conjunction with the FHP and FDOT." (Petitioners' Lodging A at 9.) Therefore, as a matter of law, the evidence of record was insufficient to support Petitioners' allegations of conspiracy against the Chiefs and the Cities. Additionally there was nothing in the record indicating the Chiefs had any input whatsoever into the activities that took place during the January 1984 roadblocks in northern Florida, and therefore, there could be no liability imposed on their municipalities as a matter of law. Having decided there was no liability on the part of the Chiefs and Cities, the District Court found the question of the Chiefs' entitlement to qualified immunity raised on summary judgment moot. (Petitioners' Lodging A at 9-10.)

Similarly, District Court and the Eleventh Circuit found as a matter of law Respondents Dempsey and Butterworth were entitled to qualified immunity because at the time of the ro adblocks, it was not clearly established the operation violated Petitioners' constitutional rights. *Merrett v. Moore,* 58 F.3d 1547, 1553 (11th Cir. 1995). (Petitioners' Lodging C at 6-9.) Also, because the planned operation did not authorize unconstitutional conduct, Respondents Moore and Dickinson were not liable as a matter of law, and Petitioners lacked standing to bring a claim for prospective relief. *Merrett,* 58 F.3d at 1554 n. 14. (Petitioners' Lodging D at 5.)

Although Petitioners argued to the Eleventh Circuit that the District Court erred in finding no liability on the part of the Chiefs and the Cities, Petitioners did not raise that issue in their Motion for Rehearing and Suggestion for Rehearing En Banc filed with the appellate court. The Eleventh Circuit affirmed the District Court's ruling that

the Chiefs and the Cities were not liable as a matter of law.[3] *Merrett,* 58 F.3d at 1554 n.14. The dissenters to the denial of the Rehearing En Banc similarly only addressed the alleged constitutional violation issues directed toward the State Respondents, apparently agreeing with the panel's affirmance of the issues pertaining to the Chiefs and the Cities. (Petitioners' App. at 11-15.)

Even more significantly, Petitioners did not raise any issues relevant the Chiefs and the Cities in their Petition for Writ of Certiorari, failing to preserve those issues for review as required by Supreme Court Rule 14.1.(a).

Therefore, all the questions raised in the Petition for Writ of Certiorari pertain only to the State Respondents, with Petitioners having waived any issues pertaining to conspiracy to violate civil rights or municipal liability asserted against the Cities and the Chiefs. Sup. Ct. R. 14.1.(a).

Petitioners also omit for this Court's consideration the undisputed affidavit presented to the District Court executed by Robert L. Edwards, Director of Local Law Enforcement Assistance, Florida Department of Law Enforcement, wherein Mr. Edwards defined the changes that would be made in any future roadblocks, thereby precluding recurrence of the perceived injustices which may have occurred during these 1984 roadblocks.[4]

Although not mentioned in their Statement, on page 23 of the Petition, Petitioners refer to occupants being sniffed

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3. Of course, the Eleventh Circuit did not address the question of the Chiefs' qualified immunity because the District Court found that issue moot. However, if this case is remanded, the Chiefs will continue to maintain they are entitled to qualified immunity, an issue never reached by the District Court.

4. Mr. Edwards' Affidavit is reproduced as Appendix A to the State Respondents' Response to Petition for Writ of Certiorari.

by large dogs. Lacking evidence of occupants being sniffed, Petitioners cite nothing in the record to support this assertion. Additionally, Petitioners did not raise this issue for the Eleventh Circuit's consideration.[5]

Lastly, the Cities and Chiefs join in the objection raised by the State Respondents to Petitioners' numerous argumentative footnotes portrayed as fact in Petitioners' Statement. In particular, Petitioners' footnotes 9 and 11 should be disregarded by this Court because they improperly cite to case law and statutes to support these misplaced arguments.

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5. In fact, the Eleventh Circuit expressly stated the dogs did not invade the plaintiffs' bodily integrity. *Merrett,* 58 F.3d at 1553.

ARGUMENT

I. The Constitutional Issues Presented for Review in the Petition for Writ of Certiorari Do Not Apply to the Chiefs or Cities

The Petition for Writ of Certiorari omits for this Court's consideration any question concerning the grounds on which the District Court granted summary judgment in favor of the Cities and the Chiefs. The Petition also omits discussion of any claims of alleged constitutional violations committed by the Chiefs and the Cities. Likewise, the propriety of the District Court's summary judgment in favor of the Cities and the Chiefs, and the Eleventh Circuit's affirmance thereof, is not "fairly included" in the questions concerning alleged constitutional violations. Therefore Supreme Court Rule 14.1.(a) prohibits this Court from reaching those issues. *See Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 114 S.Ct. 425 (1993) (writ of certiorari was improvidently granted because in order to reach the merits, the Court would have to address a question that was neither presented in the petition for certiorari nor fairly included in question presented). Petitioners waived their right to further review of any issues pertaining to the liability of the Cities and the Chiefs, and have in fact accepted the summary judgment entered in favor of the Chiefs and the Cities by the District Court on October 6, 1991, affirmed by the Eleventh Circuit's opinion. *Merrett.* (Petitioners' Lodging A; Petitioners' App. 1-9.)

The District Court entered summary judgment in favor of the Chiefs and the Cities based on well-established law concerning what the Petitioners were required to prove to support their claim of conspiracy to deprive individuals of their civil rights. The District Court found the Petitioners

simply did not present enough evidence to defeat a motion for summary judgment:

> The **record contains not one shred of evidence** that the Chiefs agreed to violate or disregard the law.... The evidence demonstrates only that the Chiefs gave an appropriate response to a legitimate request by a fellow law enforcement agency. The evidence neither demonstrates nor suggests the Chiefs' involvement in a conspiracy to violate Plaintiffs' civil rights.

(Petitioners' Lodging A at 8) (emphasis added.)

With respect to Petitioners' claim of municipal liability, the District Court also found Petitioners failed to prove their case:

> In the absence of personal involvement or a conspiracy, the Chiefs and the Cities may still be liable for the alleged unlawful actions of the city police officers if the challenged actions — here the interdiction efforts — implemented or executed policies adopted and promulgated by the Chiefs pursuant to their final policymaking authority....
>
> The **uncontroverted evidence** in this case is that the interdiction effort was planned, coordinated, and supervised not by the Chiefs but by the FDLE in conjunction with the FHP and FDOT. **There is nothing in the record** to indicate that the Chiefs had any input whatsoever into the activities which took place in January of 1984 on the roads in northern Florida. The Chiefs were involved only because they affirmatively responded to a request by the FDLE to borrow dogs and dog handlers. How those dogs and dog handlers

were subsequently employed was determined by the FDLE....

(Petitioners' Lodging A at 8-9) (emphasis added.) The Eleventh Circuit agreed. Petitioners do not seek review of either of these issues. Having waived these issues for review by this Court, Petitioners should not have included the Chiefs and the Cities as Respondents in their Petition for Writ of Certiorari.

Therefore, this Court should not grant certiorari with respect to the Cities and the Chiefs.

II. The Decision Below Does Not Directly Conflict with *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992)

The *Morales-Zamora* decision does not involve the issues decided by the District Court and the Eleventh Circuit pertaining to the liability of the Chiefs and the Cities; therefore, the *Morales-Zamora* opinion has absolutely no relevance to the Chiefs and the Cities. *Morales-Zamora* does not involve the liability of an entity loaning drug-sniffing canines to the law enforcement agency actually conducting the roadblocks, and that issue was not even remotely addressed by the Tenth Circuit.

In the instant case, Petitioners rely only on an alleged "pretext...engaged in by an agency head" and assert the "pretext here was committed at the State's highest policy level." (Petition at 16.) Petitioners assert no such allegations against the Cities and the Chiefs.

Even though not relevant to the Cities and the Chiefs, the analysis of *Morales-Zamora* is distinguishable as it pertains to all Respondents. While the Fourth Amendment issues presented in *Morales-Zamora* may have been similar, the Eleventh Circuit did not find direct conflict with the Tenth

Circuit's opinion.[6] *Morales-Zamora* involved a motion to suppress allegedly tainted evidence discovered during a roadblock where drivers licenses, proof of insurance, and vehicle registrations were checked while a trained narcotics-detection dog walked around the exterior of the defendant's car.

In the case at bar, the District Court and the Eleventh Circuit found the record was simply inadequate to find liability on the part of any of the Respondents. There was no such finding in *Morales-Zamora*. In fact, the Tenth Circuit in *Morales-Zamora* had the benefit of two evidentiary hearings before the District Court.[7] Disappointed with the outcomes at the District Court and Eleventh Circuit, Petitioners cannot now make up for deficiencies in the record which prevented them from prevailing below.

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6 The Eleventh Circuit merely stated:

> The panel was aware that the Tenth Circuit reached a different result in a somewhat similar case: *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992). We were not persuaded by that opinion.

(Petitioners' App. at 10.)

7. When the defendant Zamora was charged with unlawful possession of marijuana, she filed a motion to suppress. The District Court granted the motion to suppress, holding absent a reasonable and articulate suspicion of drug-related criminal activity, a canine sniff occurring while the driver's documents are being checked violates the Fourth Amendment. The government took an interlocutory appeal of the District Court's ruling, and the Tenth Circuit reversed, holding such dog-sniffing activity was not a search under the Fourth Amendment, assuming the roadblock was not pretextual.

On remand, the District Court conducted a second hearing on Zamora's motion to suppress on the pretext issue. The District Court denied the motion. Zamora appealed the denial of that motion to the Tenth Circuit. *Morales-Zamora*, 974 F.2d at 150.

Petitioners attempt to obtain Supreme Court review of this decision based on their confusion of valid roadblock stops with the pretext analysis adopted in roving patrol stop cases.[8] Therefore, Petitioners' reliance on this Court's review of *United States v. Whren*, 53 F.3d 371 (D.C. Cir. 1995), *cert. granted,* Sup. Ct. No. 95-5841 (Jan. 5, 1996), is misplaced.[9] In their confusion, Petitioners turn the requisite analysis for pretext upside down. Following Supreme Court precedents finding roadblocks are different from roving patrols, the Eleventh Circuit declined to extend the analysis for finding pretext in roving patrol stops to roadblocks because roadblock stops involve no individual discretion of officers in the field. *Merrett,* 58 F.3d 1550 n.2.[10]

Lastly, any perceived conflict with the *Morales-Zamora* decision is moot. Given the affidavit of the Director of Local Law Enforcement Assistance, Florida Department of Law Enforcement, and the State Respondents' representation that the procedures it utilized more than twelve years ago have changed, the 1984 roadblocks are of academic interest only and not worthy of this Court's certiorari review. (State Respondents' App.)

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8. Petitioners' confusion is shared by the dissenters to the denial of the Rehearing En Banc.

9. However, should this Court determine in its review of *Whren* that there is no pretextual stop where the roving patrol officer "could have" made the stop, there could not be a pretextual stop for a valid roadblock stop.

10. Petitioners erroneously cite *Myricks v. United States,* 370 F.2d 901 (5th Cir. 1967) as reported in the United States Reporter. It is a Fifth Circuit Case. More importantly, however, it is unclear from the context of that case whether it was a roadblock case. The Fifth Circuit stated the appellant was "stopped for a routine driver's license check." *Id.* at 902. The totality of the case suggests it may have been a roving patrol stop.

III. The Questions Presented Are Not Questions Worthy of Certiorari Review by this Court

As explained above, none of the questions presented have any relevance to the Chiefs or the Cities. Petitioners do not question the grounds on which the District Court found the Cities and the Chiefs not liable as a matter of law. Additionally, Petitioners misstate the Eleventh Circuit's analysis of their case, and assume facts not in the record to exaggerate their grievances in an attempt to obtain Supreme Court review.

The first question posed by Petitioners contains the flawed premise that the roadblock at issue was "established on the pretext of ensuring compliance with traffic related laws." (Petition at i.) The Eleventh Circuit found the state's interest in highway safety legitimate, and it was not necessary to consider the other reasons motivating the state to conduct the operation. *Merrett,* 58 F.3d at 1551. Further, the Eleventh Circuit described the operation as a "mixed motive roadblock," valid so long as one purpose presented for the roadblock could validly justify the roadblock, even if no roadblock would have been put into place but for the state's desire to hunt for unlawful drugs. *Merrett,* 58 F.3d at 1551.

Otherwise, the Petition attempts to reframe the perceived conflict with *Morales-Zamora* out of context, describing the operation as an "admitted and deliberate evasion of the law by law enforcement." (Petition at 20.) This statement has no basis in law or in fact, and is an example of Petitioners' overstatement and embellishment of the record.

The second question presented for review is likewise without merit. Petitioners once again rely on a flawed premise, assuming the roadblocks caused substantial delays and hardships to motorists that were unreasonable and therefore, unconstitutional. Petitioners also erroneously

state "the hardships caused motorists in this operation...went largely ignored in the court's analysis...." (Petition at 21.) In fact, the Eleventh Circuit analyzed this point at length:

> Next, we must consider whether this operation — as planned or in the reality of its performance — violated plaintiffs' constitutional rights; that is, whether these roadblocks were reasonable in light of the state's interest in conducting the roadblocks, the effectiveness of the operation in promoting that interest, and the level of intrusion on the individual's privacy caused by the checkpoints. *See Brown v. Texas*, 443 U.S. 47, 49-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979).

Merrett, 58 F.3d at 1551. Significantly the Eleventh Circuit relied on the facts as **presented in the record**:

> Pursuant to the operational plan, no motorist was to be detained at the checkpoint — that is the location where the motorist encountered the officers — for longer than the time required to conduct a driver's license and registration check.... **Nothing in the record indicates that, during execution of the plan, motorists were detained at the checkpoint for longer than this anticipated delay.**

Id. (emphasis added.)

> **Nothing in the record** indicates that many or most waiting drivers believed they could not leave the line.... Assuming the resulting delay to these drivers (the ones who left the line) was no more than a few minutes — **and we have no evidence to the contrary**, these motorists were not seized for an unreasonable period of time.

Id. at 1552 (emphasis added.)

> The record pertaining to whether people waiting in line believed they could turn around is not extensive.

Id. n.10.

Similarly, Petitioners incorrectly state the Eleventh Circuit did not adequately consider the disruption of Petitioners' travel plans in accordance with *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637 (1983). In fact, the Eleventh Circuit, relying on this Court's opinion in *Place,* found the search was not a search within the meaning of the Fourth Amendment. Further, based on the record, the appellate court found the use of the dogs did not increase the delay to the roadblock:

> So long as the use of the dogs did not make the delay caused by the roadblocks unreasonable — **and we have no evidence to the contrary, the state's decision to use dogs at the roadblocks does not make the operation unconstitutional.**

Id. at 1553 (emphasis added.)

Once again, Petitioners are bound by the record presented to the District Court and the Eleventh Circuit, and no amount of indignation or aggrandizement changes that they failed to prove their case below.

Petitioners' third question misstates the record by arguing motorists were seized in the line leading up to the roadblocks. Specifically Petitioners state:

> Motorists were seized by these roadblocks because a reasonable person would believe that he or she was not free to leave.

(Petition at 25.) This question is best answered by quoting the Eleventh Circuit's opinion. The panel found Petitioners simply did not produce the kind of record evidence necessary to avoid summary judgment on this issue:

> [P]laintiffs claim that the presence of a trooper in a "chase" car stationed behind the cars approaching the roadblock suggests that a reasonable person would not believe he could turn around. But, we think this circumstance is not probative.... This practice and experience suggest that people waiting at roadblocks believe they are free to turn around.
>
> Plaintiffs also claim that a reasonable person would not believe he was free to turn around for fear he could be prosecuted under Florida Statute section 316.1935.... **Nothing in the record indicates that the State of Florida has a practice of prosecuting drivers under this statute for turning around at roadblocks. And, plaintiffs present the affidavits of no drivers who wanted to turn around but say they did not do so for fear of prosecution under the s tatute.**
>
> Also, nothing in the record suggests that the physical terrain prevented motorists from turning around....
>
> **In the district court, plaintiffs stated that the record was sufficient to decide their claims on summary judgment. But, plaintiffs have failed to produce the kind of evidence in the record which would permit a fact finder to find that a reasonable person would believe he was not free to turn around.**

Id. at 1552 n.10 (emphasis added.)[11]

Lastly, Petitioners assert the canine sniffs did not establish probable cause in this instance because the dogs incorrectly signalled the presence of drugs in 27 of 28 instances. Such anecdotal evidence does not warrant Supreme Court review of a constitutional issue.

Petitioners' analysis is fundamentally flawed. Without challenging the adequacy of the dogs' training or the competency of the dogs' handlers, Petitioners simply look to the results of the search to determine whether the State Respondents had probable cause for the search. Such an argument must fail because it makes probable cause entirely dependent on an after-the-fact success ratio, not required by the Fourth Amendment.[12]

Petitioners again misstate the facts when they state Respondents have promised to repeat this operation. Their assertion flies in the face of the record, in particular the

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11. The Eleventh Circuit did find one motorist was seemingly seized for an unreasonable length of time while required to remain in line. *Merrett,* 58 F.3d at 1551. However, the Court found this supposed constitutional violation occurred in violation of the official plan, by individual officers not named in the action, who failed to let traffic pass through the roadblocks. Therefore, Respondents could not be held liable. *Id.* at 1553.

12. In *Marx v. Gumbinner,* 905 F.2d 1503 (11th Cir. 1990), a plaintiff brought a § 1983 claim based on false arrest. The Eleventh Circuit, citing *Draper v. United States,* 358 U.S. 307, 311 n. 4, 79 S.Ct. 329, 332 n. 4 (1959), stated:

> "the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

Marx, 905 F.2d at 1507 [quoting Judge Learned Hand in *United States v. Heitner,* 149 F.2d 105, 106 (2d Cir. 1945)].

Affidavit of Robert L. Edwards, Director of Local Law Enforcement Assistance, Florida Department of Law Enforcement, wherein Mr. Edwards defined the changes that would be made in any future roadblocks, and thereby prevent the recurrence of the perceived injustices which may have occurred during these 1984 roadblocks. (State Respondents' App.)

CONCLUSION

A civil case wherein the plaintiffs failed to produce evidence to avoid a summary judgment is not the kind of case to which this Court should grant certiorari review.

Even if Petitioners presented adequate evidence below to avoid summary judgment, the questions they present are not ones worthy of this Court's consideration and this Court should not grant certiorari review.

In the alternative, should this Court accept this case for review, it should only grant the writ of certiorari as to the State Respondents. The Petition does not raise any questions relevant to the liability of the Chiefs and the Cities. The summary judgment entered in their favor should, therefore, stand.

Respectfully submitted,

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